SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 73-983

WAI KWON YPI and WAI KWOK YIP,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

WAI KWON YIP and WAI KWOK YIP,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Wai Kwon Yip and Wai Kwok Yip, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming their criminal convictions.

Opinion Below

The opinion of the Court of Appeals affirming the convictions appears in Appendix A to this brief. The orders of the Court of

Appeals denying the petition for rehearing and rehearing *en banc* appear in Appendix B to this brief. The District Court did not deliver an opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit affirming the convictions was entered on August 21, 1973. The orders of the Court of Appeals denying the petitions for rehearing and rehearing *en banc* were entered on October 26, 1973. An extension of thirty days to file this petition was granted by Hon. Thurgood Marshall, Associate Justice of the Supreme Court. This petition for certiorari is filed within the thirty day extended period.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Did the electronic interception of the petitioners, without a warrant and without the consent of any party to the conversation violate the Federal Eavesdropping statutes?

2. Did petitioners lose an expectation of privacy inside an apartment into which they were invited by the owners, at the request of federal agents, because they misrepresented their reason for wishing to enter, though the misrepresentation was known to be false by the federal agents before they sought and obtained permission for the petitioners' entry?

3. Did the introduction of illegally obtained tape recordings on

the government's rebuttal case violate the exclusionary rules of both 18 U.S.C. 2515 and the Fourth Amendment?

4. Was the evidence seized from the petitioners incidental to arrest the fruit of unlawful eavesdropping?

Statement of the Case

Indictment 72 Cr. 852 charged the petitioners Wai Kwon Yip and Wai Kwok Yip, along with Pui Kan Lam and Pui Leung Lam, with one count of possessing with intent to distribute a controlled substance in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2, and with two counts of conspiracy in violation of Title 21, United States Code, Sections 846 and 963.

The four defendants were tried jointly in the United States District Court for the Eastern District of New York before Hon. George Rosling and a jury.

At the close of the Government's case, the conspiracy counts were dismissed (R. 558), the substantive count alone being submitted to the jury. All four defendants were found guilty under Count 1, and both Wai Kwon Yip and Wai Kwok Yip were sentenced to five years in jail.

STATEMENT OF FACTS

The Government's Case

The government's evidence, both on the pretrial motion to suppress and at the trial, showed that on June 25, 1972, four

young orientals spoke to the superintendent of an apartment building at 43-24 42nd Street in Queens. They asked the super, Mr. Keane, if they could enter apartment 1F. The super told them to come back the next day, when the tenants would be home (R. 180-4). A resident of the building, Mr. Pallace, had also observed the four young orientals on several occasions before June 26 ringing the bell of the apartment or peering into the window of 1F (R. 144-5).

Apartment 1F had been occupied from December 22, 1971 until January 28, 1972 by two Chinese men who had been arrested for possession of heroin (R. 73-4, 145, 182). Since April, 1972, the apartment was tenanted by a young married couple, Mr. & Mrs. Tutuyan (R. 205). In December, 1971, when the two Chinese men had moved in, the upstairs neighbor, Mr. Pallace, had heard heavy pounding noises from the bedroom below (R. 150-1). When the four young orientals came in June, the tenant and the super immediately informed agent Nunnery, who had made the arrest in January, and also took down the license plate of the car the youths had driven. The car, when checked out, was found to be registered to Sing Yip, the father of the defendants Wai Kwon Yip and Wai Kwok Yip (R. 157-60, 194, 285).

On June 26, agents Nunnery and Simmons visited the Tutuyans and asked them if they could search the apartment. Agop Tutuyan told the agents that they could do "anything they want to" (R. 208). Later that night, the four young orientals again came to the apartment and spoke to Mr. Tutuyan through the window. One of them, Wai Kwon Yip, told Tutuyan that they used to live there and haf left behind identification papers, social security cards and an immigration paper known as a green card (R. 210-12, 223). Tutuyan, following the instructions of the agents, told them that the apartment belonged to his uncle, and

that they should come back the next day between noon and 1 p.m. when the "uncle" would be home (R. 212-17). When the men left, Tutuyan telephoned agent Nunnery (R. 219).

The next day, agents Nunnery and Simmons came to the apartment in the morning and got the key to the Tutuyan apartment from the super, as had been arranged with Mr. Tutuyan (R. 287-8). They entered the apartment and searched it. In the bedroom, behind a baseboard, the agents found two brown paper bags containing two packages of white powder. The agents field tested the substance, which showed positive for heroin. They then dusted the brown paper bags with flourescent powder and returned them to the hiding place, replacing the baseboard (R. 290-308). The agents then called for reinforcements (R. 314-15). On the motion to suppress agent Nunnery added that an eavesdropping transmitter was also called for and placed in apartment 1F, under the bed, with the receiver being set up in the super's apartment. The agents only thought of using the transmitter after they found the drugs, and had not asked the Tutuyans if they could install the device, relying on their permission to do whatever they wanted as authority (R. 55-6, 71, 75, 84). Evidence concerning the installation of the "bug" was also presented at the trial during the government's rebuttal (testimony of Muniz and Van, *infra*).

At noon, the four defendants drove into the vicinity of the apartment, their actions being observed by surveilling agents. After lunching in a restaurant and a trip to a store (R. 444-52), the Yip brothers and Pui Kan Lam went to the apartment building, where Pui Leung Lam went across the street (R. 316-18, 455-62). Agent Nunnery, posing as the super's assistant spoke to Wai Kwok Yip who asked him if he could enter apartment 1F. Nunnery let the three men in and then went back

to the Keane's apartment (R. 321). On the motion to suppress, Nunnery revealed that he listened to the receiver and heard "what sounded like hammering and ripping of wood and conversation in oriental" (R. 62). Wai Kwon Yip left the apartment shortly after the three had entered, and when Wai Kwon Yip and Pui Kan Lam left about two minutes later, they were arrested (R. 324-5). Meanwhile, Wai Kwon Yip was seen leaving the window area of the apartment with a shopping bag, and he was arrested in the car along with Pui Leung Lam (R. 484-6). The shopping bag contained the two brown paper bags which held the heroin (R. 487). Upon inspection under ultraviolet light, only the hands of Pui Kan Lam showed positive for the flourescent powder previously sprinkled on the bags (R. 345-6).

Under questioning, the Yips said that they were enlisted by others to recover money supposedly left in the apartment, although at one point Wai Kwok Yip answered "yes" to a question regarding whether he knew heroin was in the packages (R. 336-7, 365-7, 393-99, 403-17, 433-5).

THE DEFENSE

Pui Kan Lam testified that in May of 1972, he met a Mr. Cheng, whom he had known in Hong Kong (R. 564), on a street near his home in Chinatown. Cheng showed Kan Lam a partial street map of Queens, which included a street number and address of an apartment on 42nd Street, and also a diagram of the apartment. Cheng told Kan Lam that $3,000 was hidden in the apartment, and sought Kan Lam's aid in recovering it, promising him $500 if he would help (R. 610). Kan Lam, however, refused (R. 610). The two then parted, and Cheng destroyed the map (R. 569-70).

About one month later, Kan Lam told Wai Kwok Yip that there was money hidden in an apartment in Queens, and asked his help in retrieving it (R. 572-683). A short time later, Kan Lam, Wai Kwok Yip, Wai Kwon Yip, and Pui Leung Lam, Kan's brother, went by car to the apartment at 43-24 42nd Street, Queens (R. 577). However, only Kan Lam and Wai Kwok Yip knew of the purpose of the trip, which was to recover money hidden in the apartment (R. 659). Finding the apartment empty (R. 577), the four left, and did not return to Queens until June 26 (R. 579).

On the evening of June 26, the four returned to 43-24 42nd Street, Queens. Apparently because his English was better than the others, Wai Kwon Yip acted as spokesman for the group. Finding the apartment occupied, Kwon asked the tenant if they could enter for the purpose of recovering documents which had been left in the apartment by a previous tenant. They were told to return the following afternoon (R. 583).

On the afternoon of June 27, Leung Lam, Kan Lam, Kwok Yip and Kwon Yip made their third trip to Queens (R. 584). On the way there, Kan Lam handed Kwok Yip $500, which he could give to the super to cover the cost of any damage the four of them might cause in the apartment (R. 705). Kan Lam had brought a screwdriver with him (R. 661).

Upon arriving in Queens, Leung Lam left the group to go window shopping (R. 587). The other three went to the apartment and were admitted by Agent Nunnery, whom Kan believed to be the building superintendent (R. 587). Kan Lam and Kwok Yip entered the apartment, but Kwon Yip remained outside, and apparently left the building (R. 592). Kan and Kwok then went into the bedroom. Kwok stood aside, and Kan pried a

baseboard off the bedroom wall, without Kwok's assistance or direction (R. 678).

Kan removed two paper wrapped packages from the wall, and without inspecting them, placed them in a shopping bag (R. 597-97). The shopping bag was tossed out of the bedroom window and was retrieved by Kwon Yip, who was passing by the open window (R. 596). Kan Lam and Kwok Yip were then arrested by Agent Nunnery (R. 599).

Pui Leung Lam testified that on June 26, 1972, he accompanied Pui Kan Lam, Wai Kwok Yip, and Wai Kwon Yip to the vicinity of 43-24 42nd Street, Queens (R. 767), but did not know why the others wanted to go there (R. 769).

On the following day, Leung Lam returned to Queens with the others. Again, however, Leung Lam knew nothing of the purpose of the trip (R. 769, 783). No one told him of the plan to recover money from the apartment at 32-24 42nd Street (R. 779).

When the four of them arrived in Queens, Leung's brother Kan told him that he and the others were going to look for a friend, and Leung was asked to wait near the car (R. 776). Kan said that he and the others would be gone a short while (R. 825). Leung went window shopping, and the others moved off in another direction (R. 880). A few minutes later, Leung went to find the others so that they could help him make a purchase at a nearby store (R. 887). He was unable to find them, and returned to the car (R. 892). Before he could reach the car, he was arrested (R. 777), and brought by government agents to the apartment at 43-24 42nd Street (R. 779).

Wai Kwok Yip testified that during the month of June, 1972,

Pui Kan Lam told him of an apartment in Queens Lam had heard about. Lam said that $30,000 was hidden in the apartment, and asked Kwok Yip to help him retrieve it (R. 1030). (This conversation took place in the presence of Pui Leung Lam, at the Lam's residence (R. 1007-1017).

A short time later, Kwok Yip drove Kan Lam, Leung Lam, and Kwon Yip to the place in Queens that Kan Lam had described. The four of them got out of the car and followed Kan Lam to the address (R. 1031). Kwon Yip, who acted as interpreter for the group, told a man Kwok believed to be the building superintendent that they had come to recover documents left behind in the apartment by a previous tenant (R. 1035). The group was told to come back another time (R. 1035).

On June 26, the group returned to Queens at Kan Lam's request (R. 1039). At this time, Kwok believed that there was money hidden in the apartment, but did not know where in the apartment the cash was hidden (R. 1041). When they arrived in Queens, Leung Lam remained at the car while the other three followed Kan Lam to 32-24 42nd Street (R. 1044, 1049).

Again, Kwon Yip acted as spokesman. At Kan's request, Kwon told a man whom Kwok believed to be the present tenant of the apartment that a friend of Kan Lam's had left certain documents in the apartment (R. 1052-53). The group was advised to return on the following day at 12:30 (R. 1053).

Kwok did not intend to return to Queens (R. 1054) but, on June 27, at Kan Lam's request, Kwok drove the four of them back to the Tutuyan apartment (R. 1054). During the trip, Kan asked Kwok to hold some money for him, but Kwok didn't count it (R. 1066, 1068).

When the group arrived in Queens, Kan Lam asked Kwok to purchase a shopping bag at a nearby store (R. 1073). At this time, Kwok also bought a screwdriver for the purpose of fixing the rear view mirror in his car (R. 1076-7). Kowk gave the shopping bag to Kan Lam (R. 1078).

Kan, Kwok and Kwon then walked to the Tutuyan apartment; Leung Lam went off on his own (R. 1082, 1084). When they arrived there, the three of them were admitted by Agent Nunnery, but only Kwok and Kan actually entered the apartment (R. 1090). Kwon went outside (R. 1090).Kan Lam then went into the bedroom; Kwok went to the bathroom, and followed Kan into the bedroom a few minutes later (R. 1094-95, 1123-24). Kwok did not converse with Lam while they were in separate rooms and heard no ripping sounds &R. 1129-30). When Kwok entered the bedroom a baseboard had already been removed from a bedroom wall. Kwok then saw Kan put something, which Kwok believed to be a package of money (R. 1107), he had retrieved from the wall into the shopping bag which Kan tossed out (R. 1100-02). Throughout this time, the screwdriver Kwok had purchased remained in his pocket, and he in no way assisted Kan either in removing the baseboard, or in placing it back on the wall (R. 1104). Shortly thereafter, Kan and Kwok were placed under arrest (R. 1104).

Wai Kwon Yip testified that on about June 20, 1972, he accompanied his brother, Wai Kwok Yip, Pui Leung Lam and Pui Kan Lam to an apartment building in Queens (R. 1215). Kwon knew neither the purpose of the trip, nor anything about Kan's belief that money was hidden in an apartment there (R. 1215). When they arrived at the Tutuyan apartment, Kwok Yip, and then Kwon conversed through a window with a man who appeared to be the tenant of the apartment (R. 1217). Kwon told

the man that a friend of Kan's had been a previous tenant of the apartment, and had left certain documents there (R. 1218). The group was told to return at another time (R. 1220).

Leung Lam then told Kwon that the purpose of the trip to Queens had been to recover money and papers which were believed to be hidden in the apartment (R. 1222). On June 26, the group went back to 32-24 42nd Street, but were told to return on the following day at 12:30 (R. 1223, 1233).

The four of them went back to Queens on June 27 (R. 1234). Kan, Kwok, and Kwon walked to 32-24 42nd Street, and Kan and Kwok were admitted to the apartment by Agent Nunnery (R. 1239). Kwon did not enter, but went outside to look for Leung Lam (R. 1240). As Kwon passed a window of the apartment, Kan called out to him, and tossed a shopping bag out of the window (R. 1241-42). Kwon believed the bag contained money (R. 1242), but did not inspect its contents (R. 1265). He returned to the car, placed the bag on the front seat, and then was arrested (R. 1265).

The Government's Rebuttal

Agent Michael Levine testified that he accompanied Agent Jesus Munez to 32-24 42nd Street, Queens, on June 27, and there met Agents Simmons and Nunnery (R. 1305). Agent Nunnery briefed Levine and told him to expect the arrival of four oriental males (R. 1306).

From the front door of an apartment adjacent to the Tutuyan's, agent Levine observed the entrance of Kwok Yip, Kan Lam, and Kwon Lam through the front door of the

apartment building, and saw the three of them admitted to the Tutuyan apartment by agent Nunnery (R. 1310). A short time later, Levine saw Kwon Yip leave the Tutuyan apartment (R. 1312) followed, about two minutes later, by Kwok and Kan (R. 1314). According to Levine, both Kwok and Kan were holding screwdrivers in their hands (R. 1315). Kwok and Kan were placed under arrest, and left in the charge of the remaining agents (R. 1316). Levine then ran outside, and arrested Leung Lam (R. 1316).

Agent Jesus Muniz testified that he arrived at the Tutuyan apartment at about 11:30 A.M. on June 27, 1972. He installed a transmitter device, with an attached microphone under a mattress in the bedroom of the apartment (R. 1413). Muniz then set u0 a receiver and tape recorder in an adjacent apartment (R. 1414). Through the front door, Muniz observed three Chinese males being admitted to the Tutuyan apartment by agent nunnery, and at that point, went to monitor his receiving equipment (R. 1416).

At trial, Muniz identified the tape he had made, and testified that it contained the tape he had made, and testified that it contained human voices speaking Chinese, noises, and certain extraneous sounds (R. 1420). Muniz said the extraneous sounds were static noise caused by the use of walkie-talkies by the agents in the vicinity of the tape recorder (R. 1421).

Pauline Van, a Chinese interpreter, listened to the tape about 80 or 90 times (R. 1449) and had made a transcript of so much of it as was audible and inteliigible (R. 1437-38). Miss Van translated the tape as follows: (1) The sound of a vuzzer (R. 1443); (2) Voices (R. 1444); (3) ..Ah.' He let us in." (R. 1444); (4) "Take (them/it) out." (R. 1445); (5) "It is here." (R. 1445);

(6) (Sounds) (R. 1446); (7) "A little bit over, be careful." (R. 1446); (8) "Okay, all done." (R. 1446); (9) "Take it out" (R. 1446); (10) "Next time it's better to go out from here." (R. 1447). Miss Van could not be sure how many voices she heard, but she was certain it was more than one (R. 1450).

REASONS FOR GRANTING THE WRIT

I. THE ELECTRONIC INTERCEPTION OF PETITIONERS INSIDE THE APARTMENT, WITHOUT A WARRANT AND WITHOUT THE CONSENT OF ANY PARTY TO THE CONVERSATION, VIOLATED THE FEDERAL EAVESDROPPING STATUTES.

According to the Federal eavesdropping statute (18 U.S.C. Section 2510, et seq.), electronic surveillance must, except in specifically enumerated situations, be authorized by a warrant. In the present case, no warrant was ever obtained, and none of the exceptions appear. Specifically, 18 U.S.C. Section 2511(a)(c)(d) allows lawful interception without a warrant where a party to the communication has given consent. In the present case, this condition has not been met. While the Tutuyans — the occupants of the apartment — arguably may have consented to the agents installing electronic equipment in their apartment,* the Tutuyans were nevertheless not parties to the recorded

*The agents never specifically asked the Tutuyans if they could install electronic eavesdropping equipment. Indeed, the last time they spoke to the occupants, the thought of using transmitters had not occurred to them. It was only after the discovery of the narcotics by the agents that they thought of using it (R. 71, 75, 84). The consent by the Tutuyans in response to the agents' request to physically search the apartment was thus not sufficiently specific to authorize an electronic search (cf. *Karwicki* v. *United States*, 55 F.2d 225 (4th Cir. 1932); *Honig* v. *United States*, 208 F.2d 916 (8th Cir. 1953)).

conversations. The statutory exception is thus not fulfilled, and the recording of the activities of the defendants in apartment 1F, in the absence of parties who may have consented to its electronic interception, is accordingly not in compliance with statutory procedures. Furthermore, while in certain emergency situations 18 U.S.C. Section 2518(7) provides for electronic interception without a warrant, that section mandates that a warrant be secured within 48 hours after the interception in order to legalize the electronic surveillance *nunc pro tunc*. But no warrant was obtained in this case, either before the interception, within 48 hours after it, or ever. Consequently, the electronic evidence was unlawfully obtained.

After the motion to suppress in this case, the Second Circuit decided *United States* v. *San Martin*, 469 F.2d 5 (2nd Cir. 1972) which discussed at length the very same issues raised here. In *San Martin* agents captured a narcotics conspirator and obtained his consent to wiretap his hotel room telephone. When another conspirator, Gonzales, telephoned the appellant San Martin on the surveilled phone, the conversation was overheard and recorded. The agents then arrested Gonzales, and gained his cooperation, without telling him that the phone was tapped. Under police surveillance, Gonzales then transferred the drugs to the appellant, and San Martin was arrested. The Second Circuit discussed the constitutional challenges to the wiretap describing them as raising "difficult and important questions of statutory interpretation and constitutional law" (469 F.2d at 7, *supra*). In *San Martin*, no warrant had been obtained, and the consent to employ electronic interception was not made by a party to the conversation. Moreover, the agents did not utilize the post-interception emergency procedures allowing a warrant application within 48 hours after the tap. The Court, however, was not required to declare the tap illegal (although the

discussion suggests that it probably was), for it was found that a source independent of the wiretap, even if illegal, was sufficient to provide probable cause to arrest. Specifically, Gonzales' cooperation, gained without use of the tap, provided the independent source. Moreover, the court pointed out, the overheard conversation was "not incriminating or offered in evidence." Since there was an independent basis for affecting Gonzales' arrest and cooperation.

In the present case, there is no problem concerning standing. The defendants were lawfully on the premises which was electronically surveilled, since they had been given permission to enter by the occupants (see, *Jones* v. *United States*, 362 U.S. 259 (1962)). Too, Wai Kwok Yip was a party to the intercepted conversation (see, *Alderman* v. *United States*, 394 U.S. 165 (1959)).* Moreover, evidence derived from the eavesdrop was utilized here, for the tape recording was introduced on the government's rebuttal case (see Point II, *infra*), and the activities overheard by the eavesdrop were central to a finding of probable cause to arrest and search, resulting in the seizure of the drugs (see, Point III, *infra*).

Consequently, since no warrant was ever obtained, and since no party to the conversation consented to the eavesdropping, the

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*While conceding that Wai Kwok Yip had standing, the Court of Appeals ruled that Wai Kwon Yip did not because his voice was not overheard and he was not in the apartment. However, the Court misconstrued the facts relating to Kwon Yip. The testimony of Pauline Van, the Chinese interpreter, shows that at the outset of the tape recording she definitely heard "more than two" voices (R. 1449-50). The third voice, of course, must have been Wai Kwon Yip's, since, according to agent Nunnery, he entered apartment 1F with his brother and Pui Kan Lam (R. 323). Indeed, the prosecutor in his summation argued to the jury that Wai Kwon Yip was in fact inside the apartment with the two others (R. 1558). Consequently, since Kwon Yip was in the apartment, and his voice was overheard, he had standing to challenge the electronic search.

electronic surveillance carried out in the present case was unlawful.

In the opinion, the Court of Appeals wrote that it was not necessary to obtain a warrant because of exigent circumstances. "The agents scarcely had enough time to call for and install their equipment and organize their surveillance, let alone obtain a warrant" (slip op. at 4999-5000). But while the officers may have had insufficient time to obtain a warrant before installing the electronic equipment, they certainly had enough time after the arrest to comply with the statutory provisions designed for such emergencies. Thus, 18 U.S.C. 2518(7) provides that a warrant may be obtained within 48 hours after the interception if exigent circumstances prevent previous application. If no warrant is obtained within the 48 hour grace period, "the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter" (18 U.S.C. 2518(7)). This statutory section was totally ignored, both by the agents and in the opinion of the Court.

The Court below also held that the petitioners were not entitled to statutory or constitutional protections from electronic eavesdropping because the manner in which they gained entry to the apartment "would seem sufficient to deny them any expectation of privacy . . . Under the circumstances appellants may be held to have assumed that their activities might be monitored" (slip op. 4998-99). In so holding, the Court stated that the entry was sought by means of false representations (slip op. 4998). Yet the record shows clearly that while the petitioners sought to gain entry by falsely stating what they wanted to retrieve from the apartment, their story was irrelevant in acquiring access to the premises. Rather, the agents wanted them to enter, and did everything in their power to assure that

the petitioners would be invited onto the premises, and into their trap. Thus, the agents instructed the owner of the apartment, Mr. Tutuyan, to tell the defendants to come back the next day when they would be able to enter (R. 210-19).When the petitioners arrived the next day, agent Nunnery, posing as the superintendant's assistant, quickly let them into apartment 1F (R. 321), since he had permission from Mr. Tutuyan to do so. Accordingly, the petitioners had proper permission to enter the apartment, in much the same way as the guest, although, of course, the reason they were allowed in was not exactly social. Indeed, where the invitation to enter was extended by the police, with the express permission of the owner of the apartment, it cannot realistically be maintained that the entry was unlawful. And if the petitioners were lawfully on the premises, they enjoyed all the expectations of privacy accorded to invitees, including the expectation that would be free from electronic searches. *Alderman* v. *United States,* 394 U.S. 165, 168-9 (1969).

Additionally, *Katz* v. *United States,* 389 U.S. 347 (1967) holds that the Fourth Amendment protects people, not places. When no one accompanied the petitioners inside the apartment, they could expect that their activities inside would remain private. They did not knowingly expose what they did to anyone else and sought to preserve what they did as private. *Katz* v. *United States,* 389 U.S. at 351, *supra.* Indeed, the defendants inside the premises closed the door behind them, spoke in tones intended to remain within the confines of the apartment, and were not overheard from outside except by use of the electronic transmitter. Under such circumstances, the petitioners were entitled to be free from illegal eavesdropping.

II. THE INTRODUCTION OF THE ILLEGALLY OBTAINED TAPE RECORDING ON THE GOVERNMENT'S REBUTTAL CASE VIOLATED THE EXCLUSIONARY RULES OF BOTH TITLE 18, U.S.C., SECTION 2515 AND THE FOURTH AMENDMENT.

During the defense case, Wai Kwok Yip testified that he accompanied one of the Lams to the apartment ostensibly to look for money and papers which was supposed to be there. Inside the apartment, Lam found the cache and removed packages from behind the baseboard. Wai Kwok Yip testified that he did not directly participate in the discovery or removal of the packages, because he first went into the bathroom, and when he reached the bedroom Lam had already opened up the wall area. On cross-examination, the prosecutor went into greater detail about the events in the apartment, eliciting from Kwok a denial that he conversed with Lam when they were in different rooms, and that he heard ripping noises (R. 1129-30). On rebuttal, the prosecutor introduced the tape recording of the conversation between at least two Chinese in the apartment while the drugs were being removed.* The prosecutor argued to the jury in summation that the tape showed at least two men participated on the removal of the drugs, talking together while ripping sounds were heard, in contrast to Kwok Yip's testimony that Lam alone removed the drugs (R. 1554-55). Furthermore, the tape, in translation, introduced a remark among the two that "next time it's better to go out from here."

In *Walder* v. *United States*, 347 U.S. 62 (1954) the Supreme Court held that questions concerning illegally seized evidence may be used in cross-examination to contradict a defendant's

*The government claimed that both Yips and Pui Kan Lam were in the apartment and removed the drugs.

direct testimony regarding the possession of the evidence found in the illegal search. In *Harris* v. *New York*, 401 U.S. 222 (1971) the Court held that a statement obtained in violation of Miranda may be introduced on rebuttal to impeach a defendant's direct testimony denial of the crime. Neither holding, however, is applicable to the present case, for the federal eavesdropping statute establishes a stricter prohibition regarding the use of evidence illegally seized by electronic means. 18 U.S.C. Section 2515 states specifically that where evidence is obtained in violation of the eavesdropping law "no part of the conents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . . This statutory prohibition is all-inclusive, and permits no exceptions. Once an illegal eavesdropping is made, its contents and fruits are categorically barred from use. Thus, whatever the exclusionary rule may be with regard to *Walder* and *Harris* situations, 18 U.S.C. 2515, by its strict terms, establishes a more stringent exclusionary rule with regard to unlawful eavesdropping.

Indeed, the protection afforded by Section 2515 is broader than the Fourth Amendment exclusionary rule in several important ways. For instance, evidence illegally seized by private persons are not excludable under the Fourth Amendment, e.g. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); *Sackler* v. *Sackler*, 15 N.Y. 2d 40 (1964). In contrast, Section 2515 applies to illegal eavesdropping by private persons as well as by governmental agents. See, *Gelbard* v. *United States*, 408 U.S. 41, 92 S.Ct. 2357 at 2362 (1972). Moreover, while confessions obtained in violation of *Miranda* have been held admissible in civil cases (see, *Terpstra* v. *Niagara Fire Ins. Co.*, 26 N.Y.2d 70 (1970); *Dixson* v. *State*, 30 A.D. 2d 626, 290 N.Y.S. 2d 682 (3rd Dept. 1968); *Azzaro* v. *Stupar*, 17 Mich. App. 170, 169 N.W. 2d 151

(1969)), and physical evidence seized in violation of the Fourth Amendment has sometimes been held admissible in civil cases which are not essentially criminal in nature (see, e.g., *Cleary* v. *Bolger*, 371 U.S. 392 (1963); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 683 (1965); *Martin* v. *United States*, 277 F.2d 785 (5th Cir. 1960); *United States* v. *Pizzarello*, 408 F.2d 579, 585-6 (2nd Cir. 1969)), Section 2515 was specifically intended to exclude illegal eavesdropping evidence from both criminal and civil cases (see, *Gelbard* v. *United States*, 92 S.Ct. at 2362, *supra*). Most strikingly, before the enactment of Section 2515, the Supreme Court in *Lanza* v. *New York*, 370 U.S. 139 (1962) wrote that it would be "a completely unprecedented step" to allow a defendant to refuse to answer grand jury questions because they related to an unlawfully overheard conversation (370 U.S. at 145). Yet in *Gelbard* the Supreme Court held that a defendant, under the authority of Section 2515, could indeed assert the illegality of the electronic search as a defense to a contempt charge. As recognized in *People* v. *DeSalvo*, N.Y. 2d (March 15, 1973), "it was the Omnibus Crime Control Act, and not the Fourth Amendment, that compelled the result in the Gelbard case". Indeed, in *Gelbard* the Supreme Court discussed at length the history and reasons for the exclusionary rule enacted by Section 2515, and found that its strict and all-enclusive exclusions were purposely adopted for reasons peculiar to the problems and dangers associated with electronic eavesdropping. Not only was the protection of privacy of communications sought to be made as strong as possible, to be breached only in strict compliance with the statute, but 2515 was also enacted "to ensure that the courts do not become partners to illegal conduct; the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings' ". To allow illegally intercepted eavesdropping evidence to be used in any way would "entangle the courts in the

illegal acts of Government agents" and thus fly in the face of the congressional objective in enacting 2515 (*Gelbard* v. *United States*, 92 S.Ct. at 2362-3, *supra*). In the present case, the court is no less entangled in illegality ecause the evidence was offered in rebuttal rather than on direct examination. Section 2515 expressed the intent of Congress to prevent any use whatsoever of evidence obtained in violation of the eavesdropping statutes, and the statute makes no exception for the government's rebuttal case.* And although the Fifth Circuit recently considered this claim and rejected it in *United States* v. *Caron*, F.2d (5th Cir. 1973), petitioners would urge on the basis of the foregoing discussion that the ruling of the Fifth Circuit in *Caron* was incorrect. Accordingly, although there might not be a constitutional infirmity to the introduction of the tapes in rebuttal on Fourth or Fifth Amendment grounds, there is a statutory bar to the introduction of the tapes. Thus, a new trial is necessary without utilization of the unlawful eavesdrop evidence.

Furthermore, even under *Walder* and *Harris* the tapes could not be used in evidence under the circumstances of the present case. As is made clear in the recent decision of *People* v. *Taylor*, P.2d , 12 Cr.L. 2179 (Cal. Sup. Ct. Oct. 20, 1972), *Walder* has definite limitations.

"When carefully read in the light of their facts Agnello and Walder . . . stand for the proposition that in narcotics cases evidence of prior possession of contraband by the defendant that was obtained by means of an illegal search and seizure is admissible for the limited purpose of impeaching the defendant as a witness only if, on his direct examination, he makes a sweeping

*The former federal immunity statute (18 USC 2514), which prevents the immune testimony from being used "in any criminal proceeding in any court" also has been recently interpreted to bar its use on rebuttal, notwithstanding *Harris* v. *New York*, *U.S.* v. *Hockenberry*, F.2d (3rd Cir. Feb. 2, 1973).

claim that he has never dealt in or possessed any narcotics; the evidence is not admissible for any purpose if the defendant merely denies committing the crime charged . . ."

Moreover, even *Walder* recognized that evidence illegally seized cannot be used in rebuttal of a defendant's testimony denying any element of the charge for which he is on trial, and the prosecutor cannot seek to set up the defendant on cross-examination by eliciting expected denials, and then contradicting them with the illegally obtained evidence. As stated in *Taylor*:

"A defendant who wishes to exercise his fundamental right to testify in his own behalf can scarcely say any less on the witness stand than was said in the present case. If even that carefully limited testimony were held to authorize the prosecutor to embark upon a wide-ranging cross-examination for the purpose of laying a foundation for introducing illegally obtained evidence by way of 'impeachment' nothing would remain of the Agnello rule. Recognizing this reality, the Walder court took the occasion to reiterate (347 U.S. at p. 65) that a defendant 'must be free to deny all the elements of the case against him.'."

In the present case, the petitioner Wai Kwok Yip's minimization of his role in the discovery of the drugs did not, even under *Walder*, permit rebuttal use of the illegally obtained tapes. His denial of participation denied one of those elements of the case against him that *Walder* left a defendant free to deny without being contradicted by unlawfully obtained evidence. As stated in *Taylor*:

> "Defendant did not rely on the illegality of the impeaching evidence as a sword to commit perjury, but simply as a shield against the consequences of concededly improper police practices."

III. THE NARCOTICS EVIDENCE SEIZED FROM THE DEFENDANTS INCIDENTAL TO ARREST WAS THE FRUIT OF THE UNLAWFUL EAVESDROPPING.

Prior to trial a hearing was held on the motion to suppress narcotics evidence seized from the defendants. The testimony revealed that the two Yips and the two Lams asked for permission to enter Apartment 1F at 4324 - 42nd Street in Queens. The apartment was at the time occupied by a Mr. and Mrs. Tutuyan, although it had previously been arrested for a narcotics violation. The agents persuaded the Tutuyans to allow the defendants entry into the apartment the next day. Meanwhile the agents asked the present occupants if they could search the apartment and the Tutuyans replied that the agents could do whatever they wanted.

The next day the agents searched the apartment and found two packages of heroin behind a baseboard in the bedroom wall. Upon discovery they requested from headquarters an electronic eavesdropping transmitter and receiver and installed the transmitter in the apartment under the bed. The agents had no specific permission to install eavesdropping equipment, but felt that the Tutuyans' consent that they could do whatever they wanted authorized the installation.

When the defendants received permission to enter and were let into the apartment by one of the agents masquerading as a janitor's assistant, their conversations and activities inside the apartment were overheard electronically by the agents seated at a receiver in another apartment. Over the electronic channel the agents heard ripping noies, which indicated to them that the defendants had located the narcotics which the agents had replaced behind the baseboard in the bedroom. As a direct result

two defendants were arrested immediately upon exiting from the apartment. While Wai Kwon Hip, who had been seen leaving the window area of apartment 1F with a shopping bag, was arrested with the other Lam in the car, and the narcotics were seized from the shopping bag.

Under these circumstances, the illegal electronic interception provided the central support for probable cause. Once the agents heard the ripping noise, it was a clear indication that the defendants were prying the narcotics from the hiding place in the wall. Indeed, it was conceded by the court below that what the agents overheard was a major reason for the arrest (R. 89). Without the overheard activities, it would have been difficult to conclude that the defendants had found the drugs and possessed evidence of crime for which a search could be conducted. For the agents did not see the defendants inside the apartment passing anything out through the window, and the defendants who left the apartment were not carrying anything away from the apartment. Consequently, since the evidence uncovered in the search was the direct fruit of the unlawful eavesdropping, it should not have been admitted into evidence under 18 U.S.C. 2515.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDICES

APPENDIX A
OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 888, 889—September Term, 1972.
(Argued May 23, 1973 Decided August 21, 1973.)
Docket Nos. 73-1150, 73-1270

UNITED STATES OF AMERICA,

Appellee,

v.

PUI KAN LAM, PUI LEUNG LAM,
WAI KWOK YIP and WAI KWON YIP,

Appellants.

Before:

KAUFMAN, *Chief Judge,*
KILKENNY* and OAKES, *Circuit Judges.*

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*Of the Ninth Circuit Court of Appeals, sitting by designation.

Appeal from judgments of conviction for violations of 21 U.S.C. §841(a)(1) following a jury trial in the Eastern District of New York, the late George Rosling, *Judge*, alleging that a warrantless interception of an oral communication between two of the appellants tainted the convictionsiof all and that the evidence against appellant Pui Leung Lam was insufficient as a matter of law.

Judgments affirmed.

ALAN SCRIBNER, New York, N.Y. (Albert J. Krieger and Ivan S. Fisher, New York, N.Y., on the brief), *for Appellants Wai Kwon Yip and Wai Kwok Yip.*
PHYLIS SKLOOT BAMBERGER, New York, N.Y. (Robert Kasanof, The Legal Aid Society, of counsel), *for Appellant Pui* AN WAM.
CHARLES H. FIER, New York, N.Y., *for appellant Pui Leung Lam.*
L. KEVIN SHERIDAN, Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York, and Robert L. Clarey, Assistant United States Attorney, on the brief), *for Appellee.*

OAKES, *Circuit Judge:*

Following a two-week trial before the late Hon. George Rosling and a jury in the Eastern District of New York, appellants Pui Kan Lam ("Kan Lam"), Pui Leung Lam ("Leung Lam"), Wai Kwok Yip ("Kwok Yip") and Wai Kwon Yip

("Kwon Yip") were found guilty on one count of possessing with intent to distribute approximately three pounds of heroin. 21 U.S.C. §841(a)(1).[1] On this appeal all appellants claim that an electronic interception of a conversation between appellants Kan Lam and Kwok Yip was illegal and that a tape recording of that conversation was erroneously admitted into evidence during the Government's rebuttal case. Additionally, appellant Weung Lam challenges the sufficiency of the evidence supporting his conviction. We reject all contentions of error and affirm the convictions.

The electronic interception occurred at Apartment 1F in a small building, 43-24 42nd Street, located in Queens, New York. Apartment 1F had been occupied by two males of Oriental extraction who were unrelated to appellants and who had been arrested on heroin importation charges in January, 1972. On June 26, 1972, the wife of the superintendent of 43-24 42nd Street called Customs agents (with whom she had become acquainted during the January investigation) to report that several young males, likewise of Oriental extraction, were attempting to gain entrance to Apartment 1F.

Suspicions aroused, Customs agents visited the building, informed the tenants of Apartment 1F of the narcotics-related history of the apartment, and obtained "free access" to it, including a consent to search it and to "do anything they want[ed] to." From the occupant of the apartment over 1F, the agents were told of hammering noises coming from the back wall of the bedroom heard during Christmas week, 1971. The tenants of 1F were instructed that in the event the men came back seeking access to the apartment they should be told the apartment belonged to a mythical uncle and that they should return the following day between noon and 1:00 p.m. when the uncle would be there.

As luck would have it, the four Oriental visitors appeared late that very night. One of them said that the four were the former occupants of 1F and wished to retrieve "immigration papers" left in the apartment. The prearranged story was recited, the night visitors departed, and Customs was called. A neighbor in the building noted the license plate number of the visitors' car and a check revealed that it was registered to the father of appellants Yip.

The next morning the agents were admitted to 1F after the tenants had left. A search revealed approximately three pounds of heroin stashed behind a bedroom baseboard. The agents dusted the heroin bags with fluorescent powder so as to leave a residue on the hands of anyone touching them.

The agents placed a transmitting "bug" beneath a mattress in the 1F bedroom and receiving equipment in the superintendent's apartment. They had received no prior judicial approval for these actions.

At approximately noon on the 27th the surveilling agents spotted the Yip car containing four occupants. After a stop at a nearby restaurant the four occupants walked toward the apartment. Two, Kwok Yip and Kan Lam, went into a store to purchase a screwdriver and a shopping bag, while the others waited outside. The appellants then divided up, with three heading for 43-24 42nd Street and Leung Lam (whose contentions of insufficiency of the evidence will be discussed *infra*) walking alone in the same general direction.

The Yips and Kan Lam were admitted to Apartment 1F by a Customs agent posing as a superintendent's helper. From a peephole in the superintendent's apartment and the receiving equipment placed therein the agents monitored the three ap-

pellants' activities. Kwon Yip left Apartment 1F almost immediately after entry. The monitoring equipment then picked up a conversation in Chinese (which the agents did not understand) and some ripping noises. Shortly thereafter, the two remaining appellants, Kwok Yip and Kan Lam, emerged from 1F and were arrested. Kwon Yip was carrying a shopping bag which contained the heroin packages dusted by the agents. Leung Lam was also arrested. Illuminatingly, on subsequent examination the hands of Kan Lam revealed traces of fluorescent powder.•• Appellants' defense was that they intended to retrieve money hidden in 1F, not heroin. Kan Lam testified that he was told of the hidden money by a somewhat mysterious "Chang" during a Chinatown conversation and was also shown a map of Queens indicating 43-24 42nd Street's location. At the time, however, Kan Lam dismissed the whole affair as a "joke." Later he claimed to have changed his mind and recruited Kwok Yip (who had access to a car) to help recover the "money". According to Kan Lam, only Kwok Yip was told of the purpose of the several trips to Queens taken by appellants; the others were taken "along for the ride." It suffices here to say that the other appellants testified along the same general lines.

After all the appellants had testified the Government introduced in rebuttal, through the testimony of a Customs agent and a Chinese interpreter, a transcript of that part of the intercepted conversation that was translatable and played the whole tape for the jury. The actual conversation introduced contained no specific references to heroin but does demonstrate that two men were engaged in conversation while the baseboard was being ripped off. This contradicted Kwok Yip's testimony on direct examination that immediately after entry he went into Apartment 1F's bathroom and remained there until after Kan Lam removed the baseboard. The final sentence of the tran-

slated transcript of the intercepted conversation introduced was: "Next time it's better to go out from here." According to appellant Kan Lam, that sentence "impli[ed] that the activities of the defendants involved other and similar activities which would be going on in the future" and "undercut the joint defense, which was that the entry into the apartment was a one-time event for the purpose of getting $30,000."

All appellants contend in varying ways that the warrantless interception of the conversation in 1F was illegal under the federal statute regulating such matters, 18 U.S.C. §2510 *et seq.*, and the fourth amendment. Appellants' argument of illegality is premised on the fact that there was no "consent" to the interception by one of the parties to the conversation[2] which, under the statute, 18 U.S.C. §2511(2)(c), is the only applicable exception to the general warrant requirement. Appellants Yip, and apparently appellant Leung Lam, argue that the interception was the principal basis for the probable cause necessary to justify the arrest of appellant Kwon Yip and the resulting seizure of the heroin. Since the interception was illegal, the argument runs, so was the seizure. All appellants additionally argue that the introduction of the tape recording in the Government's rebuttal case prejudiced them in the ways described above.

At the threshold, appellants Kwon Yip and Leung Lam, who were not at 1F at the time of the allegedly illegal interception, lack standing to challenge it under either the constitutional, *see, e.g., Brown v. United States,* 41 U.S.L.W. 4475, 4477 (U.S., Apr. 17, 1973), or statutory standard. 18 U.S.C. §2510(11).[3] To establish standing these appellants must show not that damaging evidence was introduced against them but rather that their personal rights were violated by the allegedly illegal in-

terception. "Coconspirators and codefendants have been accorded no special standind," *Alderman v. United States*, 394 U.S. 165, 172 (1969), in this regard, See *United States v. San Martin*, 469 F.2d 5, 8 (2d Cir. 1972). Since appellants Kwon Yip and Leung Lam were not in Apartment 1F during the intercepted conversation, they had no legitimate interest in protecting the privacy of the intercepted conversation. They also had no interest in protecting the privacy of the premises for they had no possessory interest in them. *See Brown v. United States*, *supra*, 41 U.S.L.W. at 4477; *cf. Alderman v. United States*, *supra*, 394 U.S. at 176-80.[4]

Appellants Kan Lam and Kwok Yip, however, are rightfully conceded by the Government to have the necessary standing since it was their conversation that was intercepted. Their claim of illegality is nonetheless rejected, because the conversation between them did not occur in a factual setting which legally justified any subjective expectation of privacy they may have had. As a result it was neither an "oral communication" within the meaning of the statute, 18 U.S.C. **2510(2),**[5] nor entitled to constitutional protection against the "uninvited ear." *Katz v. United States*, 389 U.S. 347, 352 (1967).

As we have been advised, "the Fourth Amendment protects people, not places," *Katz v. United States*, *supra*, 389 U.S. at 351, and the statutory definition of an "oral communication" tracks this constitutional concept.[6] The question we have before us is whether the subjective expectation of privacy violated by the allegedly illegal intrusion is one society is prepared to recognize as " 'justifiable.' " *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion). *See Katz v. United States*, *supra*, 389 U.S. at 352, 353 (majority opinion) and at 360-62 (concurring opinion of Harlan, J.). Measured by this objective standard

appellants' expectations must fail. The interception here did not occur in a public phone booth, *Katz v. United States, supra;* a suspect's home, *Silverman v. United States,* 365 U.S. 505 (1961); or office, *Berger v. New York,* 388 U.S. 41 (1967); or the home of a friend into which appellants had been invited. *Jones v. United States,* 362 U.S. 257 (1960). Rather it occurred in the house of complete strangers to which appellants had made several suspicious visits and into which they tried to gain entry by false representations, which alone would seem sufficient to deny them any expectation of privacy. Further, appellants were granted entry into the house by a "superintendent's helper" who then departed and left them alone. Under the circumstances appellants may be held to have assumed that their activities might be monitored. *Cf. People v. Santos,* 26 Cal. App. 3rd 397, 102 Cal. Rptr. 678 (Ct. App. 2d Dist. 1972) (interception of conversation between husband and wife over jail intercom telephone not interception of an "oral communication" within statute in part because an expectation of privacy under the circumstances would not have been reasonable). There is no danger here that upholding the interception will "smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life." *United States v. White, supra,* 401 U.S. at 787 (Harlan, J., dissenting). For "daily life" does not include conversation in the apartment of strangers under the circumstances preceding the entry here.

Additionally, in delineating the scope of the statutory and constitutional protections, the value of the law enforcement activity, *see White v. United States, supra,* 401 U.S. at 786 (Harlan, J., dissenting), as well as the officers' reasons for not obtaining a warrant, *cf. Coolidge v. New Hampshire,* 403 U.S. 443, 455 (1971), should also be considered. The value of the interception here is obvious, since it enabled relevant evidence

against appellants to be gathered that could be obtained by no other means. The reason for not securing a warrant was simply, and justifiably, the pressure of time. The officers did not even enter the apartment until approximately 9:30 a.m., after the tenants had left for work. They did not discover the heroin until sometime thereafter, approximately 10:30 a.m. According to the prearranged story planted by the tenants the Oriental visitors were to return to the apartment by noon that day and could have arrived even earlier. The agents scarcely had enough time to call for and install their equipment and organize their surveillance, let alone obtain a warrant.

Having held that appellants either have no standing to bring this challenge or are not protected by the statute or constitution, there is no need to pass on the further questions whether, absent the interception, there was probable cause to arrest Kwon Yip and seize the shopping bag containing the heroin packages; whether the transcript and tape recording of the intercepted conversation were properly introduced against appellant Kwok Yip for impeachment purposes; and whether, even if the interception was illegal, the admission of the transcript and tape recording was harmless error. We affirm the convictions of appellants Kan Lam, Kwok Yip and Kwon Yip and go on to consider the sufficiency of the evidence against appellant Leung Lam.

Leung Lam is Kan Lam's older brother and came to the United States from Hong Kong in 1968. He had worked as a merchant seaman and in the clothing industry in Hong Kong. Since his arrival in New York Leung Lam worked steadily at various jobs in the garment industry and eventually acquired ownership interests in two sportswear companies. He does not speak, read or understand English.

The evidence of Leung's involvement in this case, viewed in the light most favorable to the Government, was as follows: although appellant testified he accompanied the other appellants to Queens only on June 26 and June 27, 1972, there was evidence from which the jury could have inferred that he also accompanied them there on at least one other occasion and perhaps other times. Even one prior visit was inconsistent with Leung Lam's defense, that he was just wandering around while the others had gone to "look for a friend."

On the day of appellant's arrest, June 27, Leung Lam entered the Queens restaurant with the other appellants. After leaving the restaurant, all appellants walked east on Queens Boulevard toward 43-24 42nd Street. Leung Lam waited outside with Kwon Yip while the other appellants entered the store to purchase a screwdriver and shopping bag.

The business at the store complete, all four appellants walked east on Queens Boulevard to the corner of Queens Boulevard and 42nd Street. Kwok Yip, Kwon Yip and Kan Lam then turned north and proceeded toward the apartment house up 42nd Street on the west side of the street. Leung Lam crossed to the east side of 42nd Street but also proceeded north toward the apartment building.

The Customs agent who followed Leung Lam testified that while proceeding toward the apartment building Leung Lam frequently stopped and looked around. Still looking around, Leung Lam walked past the subject apartment building, crossed 43rd Avenue (which runs parallel to Queens Boulevard), then crossed 42nd Street and recrossed 43rd Avenue. He then proceeded past the apartment house on the west side of 42nd Street. It was here he was arrested, shortly after Kwon Yip had

left the immediate vicinity of the apartment building with the shopping bag containing the heroin. At the time of arrest, Leung Lam was walking towards Queens Boulevard, about 45 feet behind Kwon Yip, toward the parked Yip car.

Leung Lam's testimony in his own behalf was that he did not know anything about the purpose of the various trips to Queens and that he went along solely to see a movie and get a bite to eat. He claimed to have heard no conversation in the car about the purposes of the trips. The only business he ever discussed with the Yips was the possibility of financing a Chinese restaurant in which the Yips would be employed. According to Leung Lam, after the other appellants had told him they were leaving to "meet a friend," he entered a store to buy some yarn but needed an interpreter to negotiate the purchase and therefore left the store to look for the other appellants. He was doing that, he said, just before his arrest.

The jury could find, however, that Leung Lam acted as a lookout for the group and did not innocently go along with the others "just for the ride." While the evidence against appellant was entirely circumstantial, *see United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972), and less than overwhelming, we cannot conclude it was insufficient as a matter of law. Leung Lam followed the appellants toward the apartment on the opposite side of the street. The testimony of the surveilling agents disputed his testimony that he entered a store to shop for yarn. According to the agents he never lost sight of the others until they entered the apartment building. He admitted on cross-examination[7] that he made purchases alone in non-Chinese stores "many times" and that he could read Arabic price tags on merchandise. Given that admission, and the agent's testimony,

the jury could rationally discredit entirely Leung Lam's story that at the time of arrest he was wandering on the street seeking an interpreter to help him negotiate a purchase of yarn. The jury could thus interpret appellant's conduct as indicating "concer[n] about possible police surveillance or interference from innocent passers-by," *United States v. Carneglia*, 468 F.2d 1084, 1088 (2d Cir. 1972), and not as the conduct of an innocent caught in a police dragnet.

As a matter of common sense, the jury was entitled to take into account what appears to us an incredibility inherent in Leung Lam's story. *United States v. Arcuri*, 405 F.2d 691, 695 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969). It is a little difficult to believe that a man of some sophistication and business success within the Chinese community would take at least two trips to an unknown location in Queens without inquiring or hearing anything about the purpose of the trips (which happened to result in his younger brother and two friends acquiring a cache of heroin). There was no language barrier in his communications with the other appellants that prevented such an inquiry. Further, there is the fact that far from being the most docile member of the group, Leung Lam provided virtually all support for his younger brother and had proposed a restaurant venture in which he would be "the boss" of the Yips. *Cf. Nye & Nissen Corp. v. United States*, 336 U.S. 613, 619 (1949); *United States v. Fried*, 464 F.2d 983, 985 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972). This role as provider and proposer is hardly consistent with his claim of passive association with the narcotics recovery operation. Rather, Leung Lam's isolation from contact with the apartment could rationally be viewed by the jury as an effort to insulate himself from criminal liability, to put himself in the position of a manipulative leader rather than an unwitting innocent. Such inferences are for juries to draw and

we will not disturb them on appeal, at least where, as here, there was a fair aiding and abetting charge. *See United States v. Infanti*, 474 F.2d 522, 526 (2d Cir. 1972); *United States v. Fried*, *supra*, 464 F.2d at 985.

Judgments affirmed.

FOOTNOTES TO APPENDIX A

1. The appellants Lam were each sentenced to a term of ten years' imprisonment and five years' special parole, sentences they are presently serving. The appellants Yip were each sentenced to five years' imprisonment and five years' special parole. They are free on bail pending this appeal.

2. The Government does not contend here, as it apparently did below, that the consent by the tenants to "do anything they want[ed] to" in Apartment 1F satisfied the statutory requirement of consent by "one of the parties to the communication." 18 U.S.C. §2511(2)(c). *See United States v. San Martin*, 469 F.2d 5, 7 (2d Cir. 1972) (dictum).

3. 18 U.S.C. §2510(11) provides:

> "[A]ggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

4. The rationale of the only case cited by appellants Kwon Yip and Leung Lam to support their standing, *Jones v. United States*, 362 U.S. 257 (1960), has been questioned in the recent *Brown v. United States*, 41 U.S.L.W. 4475 (U.S., Apr. 17, 1973). The *Jones* concept of "automatic standing" to contest an allegedly illegal search and seizure where, as here, the same possession needed to establish standing is "an essential element of the offense charged," *Simmons v. United States*, 390 U.S. 377, 390 (1968), is thus of dubious vitality. But we need not and do not decide what is left of *Jones* after *Brown*, for the rationale of *Jones* is simply inapplicable to this case, as it was to the case presented to the Court in *Brown*. The *Jones* Court conferred "automatic standing" on the petitioner there because it was "not consonant with the amenities, to put it mildly, of the administration of criminal justice," 362 U.S. at 263, to require a defendant to affirm possession of contraband for purposes of establishing standing to challenge an illegal search and seizure and later to require him to deny it at trial of guilt or innocence. Here, there is no conflict with such "amenities," as appellants do not contest their actual or constructive possession of the narcotics, only their knowledge of what they were possessing. Thus, the *Jones* rationale is plainly inapposite here and appellants Kwon Yip and Leung Lam have no other basis to establish standing to challenge the legality of the interception.

5. 18 U.S.C. §2510(2) defines an "oral communication" as:

> "[O]ral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. . . .

6. In contrast, the statutory definition of "wire communication," the interception of which is also prohibited, contains no "justified" expectation

of privacy requirement. *See United States v. Carroll*, 332 F. Supp. 1299, 1301 (D. D.C. 1971).

7. Once a defendant offers evidence after the denial of a motion for acquittal at the close of the Government's case in chief, of course, the defendant waives any claim as to the sufficiency of the Government's case considreed alone. *United States v. Arcuri*, 405 F.2d 691, 695 n.7 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969).

APPENDIX B
ORDERS DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy-three.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge
HON. JAMES L. OAKES,
HON. JOHN F. KILKENNY,
Circuit Judges

United States of America,

Plaintiff-Appellee,

v.

Pui Ken Lam, Pui Leung Lam, Wai Kwok Yip and Wai Kwon Yip,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for appellants Wai Kwok Yip and Wai Kwon Yip,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 26th day of October one thousand nine hundred and seventy-three.

United States of America,

Plaintiff-Appellee,

v.

Pui Kan Lam, Pui Leung Lam, Wai Kwok Yip and Wai Kwon Yip,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellants Wai Kwok Yip and Wai Kwon Yip, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

SUPREME COURT, U. S.

FILED

FEB 27 1974

MICHAEL RODAK, JR., CLERK

Nos. 73-983 and 73-5714

In the Supreme Court of the United States

OCTOBER TERM, 1973

WAI KWON YIP AND WAI KWOK YIP, PETITIONERS

v.

UNITED STATES OF AMERICA

PUI KAN LAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-983

WAI KWON YIP AND WAI KWOK YIP, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5714

PUI KAN LAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioners and a co-defendant, Pui Leung Lam, were convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner Lam was sentenced to ten years' imprisonment and a five year special parole term. Petitioners Kwon Yip and Kwok Yip were

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[1]The petition for a writ of certiorari of co-defendant, Pui Leung Lam, No. 73-5430, is presently pending.

sentenced to five years' imprisonment and a five year special parole term. The court of appeals affirmed in a thorough opinion. (Pet. App. B).

Petitioners contend that a conversation between Lam and Kwok Yip while in a stranger's apartment, to which they had gained entrance by misrepresentation in an effort to recover narcotics believed by them to be secreted therein, was improperly intercepted in violation of the Fourth Amendment and of 18 U.S.C. 2510, *et seq.* This contention was thoroughly discussed and properly rejected by the court of appeals, in an opinion on which we rely.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.